KELAB LUMBA KUDA PERAK

v.

MENTERI SUMBER MANUSIA, MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
DENIS ONG JCA
ZULKEFLI MAKINUDIN J
[CIVIL APPEAL NO: W-01-61-2001]
14 APRIL 2005

LABOUR LAW: *Trade union - Recognition - Claim for - Whether claim for recognition brought against wrong parties - Whether DGTU and DGIR ought to have been made parties*

LABOUR LAW: *Trade union - Recognition - Claim for - Whether temporary or causal employees excluded from union representation*

LABOUR LAW: *Trade union - Recognition - Whether necessary for Minister to first establish categories of workmen before determining whether to accord recognition*

LABOUR LAW: *Trade union - Recognition - Membership verification - Whether failure of DGTU to include temporary and casual employees in verification exercise an error - Whether such failure would nullify entire recognition exercise*

ADMINISTRATIVE LAW: *Remedies - Judicial review - Claim for trade union recognition - Whether failure of Minister to give reasons for ordering recognition violated rules of procedural fairness*

LABOUR LAW: *Trade union - Recognition - Order for - Whether such order would affect constitutional rights of employees*

LABOUR LAW: *Trade union - Recognition - Membership verification - Secret ballot - Legitimate expectation - Whether employer had legitimate expectation that secret ballot would be carried out instead of verification exercise*

LABOUR LAW: *Trade union - Recognition - Membership verification - Secret ballot - Whether DGTU's rejection of verification by secret ballot perverse and unreasonable - Whether membership verification by secret ballot appropriate in circumstances of the case*

The second respondent had claimed trade union recognition from the appellant. The claim for recognition was in respect of all the appellant's employees, excluding those in managerial, executive, confidential or security positions. The appellant wrote to the Director General of Industrial Relations ('the DGIR') disputing the scope and extent of the second respondent's representation. The appellant requested a secret ballot be carried out to determine membership. The DGIR subsequently requested the Director General of Trade Unions ('the DGTU') to ascertain the membership percentage of the second respondent. Pursuant to the DGTU's request, the appellant submitted a list of 88 permanent employees together with a revised list of temporary and casual employees. The DGTU by letter dated 15 January 1997 requested the appellant and the second respondent to state their choice as to the manner in which verification of membership would be carried out. The appellant again requested for a secret ballot. However, the DGTU after informing both parties, carried out a membership check by way of membership verification. No reason was given as to why a secret ballot was not held. The DGIR later informed the DGTU that the verification exercise conducted revealed that 72.41% of the appellant's employees were within the scope of the second respondent's representation as at the date of the claim for recognition. The DGTU informed the appellant of such findings and advised the appellant to accord recognition. No particulars were given as to how the membership percentage was arrived at. The appellant however rejected such findings and expressed disappointment at the DGTU's refusal to undertake a secret ballot. The appellant doubted the number of employees said to be members of the second respondent. Thereafter, the DGIR, acting under reg. 4(1) of the Industrial Relations Regulations 1980, directed the DGTU to conduct a membership check once again. The DGTU refrained from doing so and instead informed the DGIR that the result of the earlier membership verification based on the 88 permanent employees remained. The DGTU also informed the DGIR that the verification exercise had excluded temporary employees since the second respondent had informed it that only permanent employees were accepted as members. The DGIR instructed the appellant to accord recognition to the second respondent. Later, the first respondent – the Minister of Human Resources – ordered the appellant to do so pursuant to s. 9(1) of the Industrial Relations Act 1967 ('the Act'). The appellant applied to the High Court, *inter alia* for *certiorari* to quash the

decision of the first respondent. The High Court however dismissed the application since it was of the view that the appellant had sued the wrong parties. The High Court held that both the DGIR and the DGTU should have been made parties to the action. The appellant appealed to the Court of Appeal.

Held (allowing the appeal with costs)
Per Zulkefli Makinudin J:

[1] The High Court had clearly erred in law in concluding that the action had been brought against the wrong parties. The DGTU and the DGIR had no power to accord recognition to the second respondent. Hence, it would be erroneous to name them as parties to the action. The first respondent's decision was premised on the decisions of the DGTU and the DGIR without applying his mind to the material before him. Thus if the decision-making process was flawed, it was the decision of the first respondent that was subject to challenge. (p 528 e-g)

[2] Pursuant to ss. 2 and 9(1) of the Act, it would be wrong to exclude workmen who did not fall within the four categories mentioned under s. 9(1) from the scope of union representation. Clearly, it would also be illegal to exclude temporary employees from the scope of union representation. There is no distinction between temporary, casual or permanent employees. (p 531 c)

[3] The appellant contended that temporary and casual workmen were to be included in the scope of the second respondent's representation. The second respondent took a contrary view. It was thus a condition precedent for the first respondent to ascertain the number of categories of workmen within the second respondent's scope of representation before determining the secondary issue of whether to accord recognition. (p 531 e)

[4] In ascertaining the membership percentage, the DGTU based its decision solely on the original incomplete list of employees. It had refused to consider the revised list submitted by the appellant when it had been directed to do so by the DGIR. The DGTU had arbitrarily accepted the second respondent's assertion that temporary and casual employees were not within its (second respondent's) scope of representation and dismissed the appellant's revised list. At the very least, the DGTU was statutorily obliged to verify whether the employees in the revised list were within the scope of representation. The failure of the DGTU to include temporary and casual employees in the verification exercise was an error in breach of the Trade Unions Act 1967 and the Industrial Relations Act 1967. This nullified the entire recognition exercise. (p 532 e-g)

[5] The fact that the DGTU automatically rejected the appellant's request for a secret ballot on account of the fact that there was no joint request by the parties for a secret ballot was a perverse and unreasonable exercise of discretion as to how to conduct the membership check. Had it been the policy of the DGTU's department to proceed by way of a membership verification exercise, it was superfluous for the DGTU to have issued the letter of 15 January 1997 requesting the parties to state their preferred choice as to the method for membership check. More importantly, this policy was contrary to the stand that the DGTU and first respondent took in *Minister of Human Resources v. National Union of Hotel, Bar and Restaurant Workers* [1997] 3 MLJ 377, wherein the Court of Appeal endorsed that secret ballot was the most democratic way of determining the choice of the employees. (pp 534 d-h & 535 a-b)

[6] The appellant had acquired a legitimate expectation that a secret ballot would be carried out instead of a verification exercise since the purpose was to determine the percentage of workmen who were members of the union making a claim for recognition. Further, a verification exercise would not be able to address the issue raised by the appellant in relation to the authenticity and voluntariness of the signatories in the membership rolls. On the facts, the first respondent, in agreeing and adopting the decision of the DGTU and in making an order for recognition under s. 9 of the Act, had acted in breach of the appellant's legitimate expectation that a secret ballot would be conducted to determine the membership of the second respondent. (p 535 c-f & g)

[7] It was of paramount importance to ensure that all the affected employees of the appellant had a right to state their choice through secret ballot as to whether they elected to be members of the second respondent. Membership would effectively cause them to assign their contracting rights to the second respondent. The order of recognition therefore had a serious impact to the employees' constitutional rights as it would affect their terms and conditions of employment by the collective bargaining. (p 536 a-e)

[8] The failure of the first respondent to give reasons for his order of recognition and for adopting the recommendations of the DGTU and the DGIR violated the rules of procedural fairness. The discretion of the DGIR and DGTU to decide on the method of membership check was not unfettered and subject to the overriding principles of fairness. The decision of the first respondent was fundamentally flawed on the basis that it had violated principles of procedural fairness guaranteed under art. 8 of the Federal Constitution and ought therefore to be quashed. (pp 537 h & 538 a-c)

Per curiam:

[1] Once a trade union of employees is accorded recognition, it contracts on behalf of all employees within its scope of representation. The order for recognition has the effect of taking away the individual rights of non-union members and future employees to contract and to bargain on their terms and conditions of employment. The contracting rights are transferred from the employees to the trade union. The collective agreement – the agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment or concerning relations between such parties – binds all employees who fall within the scope of representation of the trade union irrespective of whether they are members or not. (p 530 a-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden kedua menuntut pengiktirafan kesatuan sekerja dari perayu. Tuntutan pengiktirafan adalah berkaitan pekerja-pekerja perayu, tidak termasuk mereka yang berada dalam posisi-posisi pengurusan, eksekutif, kerahsian atau keselamatan. Perayu menulis kepada Ketua Pengarah Perhubungan Perusahaan ('DGIR') mempertikai bidang dan takat representasi responden kedua. Perayu juga memohon supaya undian secara sulit dijalankan bagi menentukan keahlian. DGIR kemudiannya meminta Ketua Pengarah Kesatuan Sekerja ('DGTU') menentukan peratus keahlian responden kedua. Berikutnya, atas permintaan DGTU, perayu mengemukakan senarai 88 pekerja tetap beserta dengan senarai terakhir pekerja-pekerja sementara dan tidak tetap. Melalui surat bertarikh 15 Januari 1997, DGTU meminta perayu dan responden kedua untuk menyatakan pilihan mereka berkenaan cara untuk mengesahkan keahlian. Perayu sekali lagi meminta pengundian sulit. Bagaimanapun, DGTU, setelah memberitahu kedua-dua pihak, telah menjalankan pemeriksaan ahli melalui pengujian keahlian. Tiada alasan diberi kenapa pengundian sulit tidak dijalankan. DGIR kemudian memberitahu DGTU bahawa pengujian menunjukkan bahawa pada tarikh tuntutan pengiktirafan, 72.41% pekerja-pekerja perayu adalah termasuk dalam bidang representasi responden kedua. DGTU memberitahu perayu tentang keputusan ini dan seterusnya menasihati perayu untuk memberi pengiktirafan. Tiada butiran diberi bagaimana peratus keahlian di atas dikira. Perayu bagaimanapun menolak keputusan dan melahirkan kekesalan atas keengganan DGTU melaksanakan pengundian sulit. Perayu juga meragui jumlah pekerja-pekerjanya yang dikatakan menjadi ahli responden kedua. Berikutnya, DGIR, bertindak di bawah s. 4(1) Peraturan-Peraturan Perhubungan Perusahaan 1980, mengarahkan DGTU untuk menjalankan pemeriksaan keahlian sekali lagi. DGTU enggan berbuat demikian dan sebaliknya memberitahu DGIR bahawa

keputusan pemantauan keahlian sebelumnya berdasarkan 88 pekerja tetap masih terpakai. DGTU juga memberitahu DGIR bahawa pengujian yang dibuat telah mengeluarkan pekerja-pekerja sementara kerana beliau diberitahu oleh responden kedua bahawa hanya pekerja tetap sahaja yang diterima sebagai ahli. DGIR lantas mengarahkan perayu supaya memberikan pengiktirafan kepada responden kedua. Dan berikutnya, responden pertama – Menteri Sumber Manusia – memerintahkan perayu berbuat demikian berdasarkan s. 9(1) Akta Perhubungan Perusahaan 1967 ('Akta'). Perayu memohon ke Mahkamah Tinggi antara lain untuk perintah *certiorari* bagi mengenepikan keputusan responden pertama. Mahkamah Tinggi bagaimanapun menolak permohonan atas alasan bahawa perayu telah mendakwa pihak yang salah. Menurut Mahkamah Tinggi, kedua-dua DGIR dan DGTU harus dijadikan sebagai pihak-pihak dalam tindakan. Perayu merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dengan kos):
Oleh Zulkefli Makinudin J

[1] Mahkamah Tinggi jelas silap di sisi undang-undang apabila merumuskan bahawa tindakan telah dibawa terhadap pihak yang salah. DGTU dan DGIR tiada kuasa untuk memberi pengiktirafan kepada responden kedua. Oleh itu, adalah salah untuk menamakan mereka sebagai pihak-pihak dalam tindakan. Keputusan responden pertama adalah berasaskan keputusan-keputusan DGTU dan DGIR tanpa ia memberi pertimbangan peribadi kepada material yang ada di hadapannya. Maka itu, jika proses membuat keputusan cacat, keputusan yang patut dicabar adalah keputusan responden pertama.

[2] Berdasarkan ss. 2 dan 9(1) Akta, adalah salah untuk menyingkir dari bidang representasi kesatuan mereka-mereka yang tidak terangkum ke dalam mana-mana empat kategori yang disebut oleh s. 9(1). Adalah juga salah untuk menyingkir pekerja-pekerja sementara dari bidang representasi kesatuan. Ini kerana tidak wujud perbezaan antara pekerja-pekerja tetap, sementara ataupun tidak tetap.

[3] Perayu berkata bahawa pekerja-pekerja sementara dan tidak tetap adalah termasuk ke dalam bidang representasi responden kedua. Namun, responden kedua mengambil pandangan yang bertentangan. Dengan itu menjadi satu syarat bagi responden pertama untuk menentukan jumlah kategori pekerja yang termasuk di dalam bidang representasi responden kedua, sebelum menentukan isu yang kurang penting, iaitu sama ada untuk memberikan pengiktirafan atau tidak.

[4] Dalam menentukan peratus keahlian, DGTU mengasaskan keputusannya semata-mata atas senarai asal pekerja-pekerja yang tidak lengkap. Ia enggan mempertimbang senarai yang disemak yang dikemukakan oleh perayu walaupun diperintah untuk berbuat demikian oleh DGIR. DGTU dengan secara arbitrari telah menerima hujah responden kedua bahawa pekerja-pekerja sementara dan tidak tetap adalah tak termasuk ke dalam bidang representasinya dan telah menolak senarai disemak yang dikemukakan perayu. DGTU, paling tidak, harus mempunyai obligasi di bawah statut untuk mengesahkan sama ada pekerja-pekerja di dalam senarai disemak terangkum oleh bidang representasi. Kegagalan DGTU untuk memasukkan pekerja-pekerja sementara dan tidak tetap dalam proses pengujiannya adalah satu kesilapan yang melanggar Akta Kesatuan Sekerja 1967 serta Akta Perhubungan Perusahaan 1967. Ini membatalkan keseluruhan proses pengiktirafan.

[5] Fakta bahawa DGTU telah secara automatik menolak permintaan perayu untuk diadakan pengundian sulit dengan alasan bahawa tidak terdapat permintaan bersama untuk pengundian sedemikian adalah memudaratkan dan menunjuk kepada pelaksanaan budibicara yang tidak munasabah berkaitan cara memeriksa keahlian. Sekiranya menjadi dasar jabatan DGTU untuk meneruskan dengan proses pengujian keahlian, maka adalah tidak perlu untuk DGTU mengeluarkan surat bertarikh 15 Januari 1997 meminta pihak-pihak menyatakan pilihan mereka berkenaan cara untuk mengesahkan keahlian. Lebih penting, dasar ini adalah bertentangan dengan pendirian bahawa DGTU dan responden pertama telah mengambil kira *Minister of Human Resources v. National Union of Hotels, Bar and Restaurant Workers*, di mana Mahkamah Rayuan mengesahkan bahawa pengundian sulit adalah pengundian paling demokratik dalam menentukan pilihan pekerja-pekerja.

[6] Perayu telah diberikan pengharapan sah bahawa pengundian sulit akan dilaksanakan, dan bukannya proses pengujian, oleh kerana tujuannya adalah untuk menentukan peratusan pekerja-pekerja, yang menjadi ahli kesatuan, yang menuntut pengiktirafan. Selain itu, proses pengujian tidak mampu menjawab isu yang dibangkit oleh perayu berhubung kebenaran dan kerelaan hati penandatangan-penandatangan dalam senarai ahli. Berdasarkan fakta, responden pertama, dalam menyetujui dan menerima keputusan DGTU dan membuat perintah pengiktirafan di bawah s. 9(1) Akta, telah bertindak secara yang bertentangan dengan pengharapan sah perayu bahawa suatu pengundian sulit akan dilaksanakan bagi menentukan keahlian responden kedua.

[7] Adalah sangat penting untuk mempastikan bahawa kesemua pekerja-pekerja perayu yang terjejas mempunyai hak untuk menyatakan pilihan mereka melalui pengundian sulit, iaitu sama ada untuk menjadi ahli responden kedua ataupun tidak. Keahlian, secara berkesannya, akan menyebabkan hak berkontrak mereka terpaksa diserahhak kepada responden kedua. Perintah pengiktirafan, dengan itu, mempunyai impak serius kepada hak-hak perlembagaan pekerja-pekerja, kerana ia memberi kesan kepada syarat dan terma pekerjaan mereka melalui rundingan bersama.

[8] Kegagalan responden pertama memberi sebab bagi perintah pengiktirafan, dan keputusannya untuk menerimapakai cadangan DGTU dan DGIR, telah melanggar kaedah-kaedah keadilan prosedur. Budibicara DGIR dan DGTU dalam menentukan kaedah pemeriksaan keahlian bukanlah tidak terbatas dan adalah tertakluk kepada prinsip-prinsip keadilan. Keputusan responden pertama adalah cacat pada dasarnya kerana menyalahi prinsip-prinsip keadilan prosedur yang dijamin di bawah Fasal 8 Perlembagaan Persekutuan dan dengan itu harus dibatalkan.

Per curiam:

[1] Sebaik sahaja suatu kesatuan sekerja diberikan pengiktirafan, ia berkontrak bagi pihak kesemua pekerja yang termasuk dalam bidang respresentasinya. Kesan perintah pengiktirafan adalah bahawa ia akan mengambil hak peribadi pekerja-pekerja yang bukan ahli kesatuan dan bakal pekerja-pekerja untuk berkontrak dan merunding syarat-syarat dan terma-terma pekerjaan mereka sendiri. Hak untuk berkontrak telah dipindah dari pekerja-pekerja kepada kesatuan sekerja. Perjanjian Bersama – yakni perjanjian bertulis yang dimasuki di antara seorang pekerja atau kesatuan sekerja majikan-majikan di satu pihak dan kesatuan sekerja pekerja-pekerja di pihak yang lain berhubung dengan terma-terma dan syarat-syarat pekerjaan atau berkait dengan perhubungan mereka – mengikat kesemua pekerja yang termasuk dalam bidang representasi kesatuan sekerja, tanpa mengira sama ada mereka ahli ataupun tidak.

Case(s) referred to:

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Hong Leong Equipment v. Liew Fook Chuan [1997] 1 CLJ 665 CA ***(refd)***

Minister of Labour v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Minister of Human Resources v. National Union of Hotel, Bar and Restaurant Workers [1998] 1 CLJ 215 CA ***(refd)***

Rohana v. Universiti Sains Malaysia [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***

Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah [1998] 3 CLJ 85 CA ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Federal Constitution, arts. 5, 8

Industrial Court Rules 1980, r. 4(1)(c)

Industrial Relations Act 1967, ss. 2, 9(1), (1A), (4C), 20(3)

Industrial Relations Regulations 1980, reg. 4(1)(c)

Trade Unions Act 1959, s. 26(3)

Trade Unions Regulations 1959, regs. 62, 63, 67

For the appellant - N Sivabalah (Suganthi Singam with him); M/s Shearn Delamore & Co

For the 1st respondent - Ishak Bakri SFC

For the 2nd respondent - LG Seah; M/s Lobo & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-44-2000]

Reported by Andrew Christopher Simon

JUDGMENT

Zulkefli Makinudin J:

This is an appeal against the decision of the learned judge of the High Court dismissing the appellant's application for an order of *certiorari* to quash the decision of the first respondent ordering the appellant to accord recognition to the second respondent as a trade union of workmen under s. 9(1) of the Industrial Relations Act 1967 ("the Act"). Having heard the submissions of learned counsels for the respective parties we were unanimous in our decision allowing the appeal. We now give the reasons for our decision.

The relevant facts of this case are as follows:

(1) By a letter dated 12 August 1996, Kesatuan Pekerja-Pekerja Kelab Semananjung Malaysia ("the second respondent") sought recognition from the appellant in respect of employees of the appellant who had become its members. In the recognition claim, the second respondent sought recognition for all employees of the appellant excluding those in managerial, executive, confidential or security positions.

(2) On receipt of the second respondent's claim for recognition, the appellant wrote a letter dated 26 August 1998 to the Director General of Industrial Relations ("DGIR") wherein it disputed that the second respondent represented a majority of its members. The appellant further requested

a that a secret ballot be undertaken for purposes of establishing whether a majority of their employees were members of the second respondent at the material time.

(3) By a further letter dated 26 August 1996, the appellant informed the second respondent that recognition could not be accorded as the second respondent was not the appropriate union to represent the employees of the appellant.

(4) By a letter dated 16 September 1996 to the appellant, the DGIR confirmed that the second respondent had submitted a claim for recognition and requested the appellant to submit the particulars requested therein.

(5) By a letter dated 16 October 1996 from the DGIR to the Director General of Trade Unions ("DGTU") which was copied to the appellant, the DGTU was requested to, *inter alia*, undertake the necessary investigations under r. 4(1)(c) of the Industrial Court Rules 1980 to ascertain the percentage of membership of the second respondent as at the date of the claim for recognition.

(6) By a letter dated 29 October 1996 from the DGTU to the appellant the appellant was requested to provide particulars as stipulated in the aforesaid letter.

(7) The appellant duly complied with the DGTU's request. Initially the appellant submitted a list of 88 permanent employees *vide* their letter of 25 September 1996. The appellant subsequently included in the list the names of the temporary and casual employees of the appellant as they formed an integral part of the appellant's operations and were employees within the meaning of the Act as well as the scope of representation of the second respondent.

(8) By a letter dated 15 January 1997 from the DGTU to the appellant, the appellant and the second respondent were given an opportunity to state their choice as to the manner in which the verification of members would be undertaken, ie, through a secret ballot or through a membership verification exercise.

(9) The appellant *vide* a letter dated 20 January 1997 reiterated its request that a secret ballot be undertaken to determine if the majority of their employees within the scope of representation of the second respondent, were members of the second respondent at the material time.

(10) Notwithstanding the appellant's request, the DGTU by its letter dated 5 February 1997, informed the appellant and the second respondent that a membership verification exercise would be undertaken to ascertain the percentage of members in the second respondent. No reasons were given as to why a secret ballot was not carried out.

(11) By a letter dated 4 March 1997, which was copied to the appellant, the DGTU informed the second respondent that it would be undertaking a membership verification exercise at the second respondent's premises on 5 April 1997.

(12) The appellant *vide* a letter dated 14 March 1997 to the DGTU once again requested that a secret ballot be undertaken for the reasons stipulated in the aforesaid letter.

(13) By a letter dated 28 March 1997, the DGIR was informed by the DGTU that a verification exercise had been conducted and that as at the date of the claim for recognition, the scope of representation of the second respondent was 72.41%.

(14) By a letter dated 10 April 1997, the DGIR informed the appellant that 72.41% of its employees within the scope of representation of the second respondent had become members of the second respondent as at 12 August 1996 and advised the appellant to accord recognition to the second respondent. No particulars were given to the appellant as to how this percentage was arrived at.

(15) The appellant in its letter dated 23 April 1997 to the DGIR stated that it was unable to accept the decision on the membership check undertaken by the DGTU and express disappointment at the DGTU's refusal to undertake a secret ballot. The appellant inform the DGTU that in the circumstances, it was unable to accord recognition to the second respondent. In the aforesaid letter the appellant expressed doubt that 392 employees of the appellant could have been members of the second respondent as at 12 August 1996.

(16) By a letter dated 15 May 1997 to the second respondent, the DGIR exercised his powers under reg. 4(1)(c) of the Industrial Relations Regulations 1980 and requested that the DGTU conduct a membership check once again to ascertain the number and categories of employees within the scope of representation of the second respondent in light of the appellant's assertion that as at 12 August 1996, ie, the second respondent's claim for recognition, it had 541 employees.

(17) Contrary to the DGIR's directive, the DGTU refrained from conducting a membership check and instead informed the DGIR that the result of the membership verification exercise which had been conducted earlier based on 88 permanent employees of the appellant remained. The DGTU also informed the DGIR that the verification exercise had excluded temporary employees as it had been informed by the second respondent that it only accepted permanent employees as its members.

(18) The second respondent replied by letter dated 12 June 1997 wherein it, *inter alia*, disputed the number and categories of employees by the appellant and requested to expedite action under s. 9(4C) of the Act.

(19) The DGIR *vide* letter dated 12 September 1998 instructed the appellant to accord recognition to the second respondent.

(20) By letter dated 24 March 2000 the appellant was informed that the first respondent had decided that the appellant accorded recognition to the second respondent with effect from 12 August 1996.

At the outset we would like to state here that the learned judge of the High Court had erred in law in holding that the appellant had sued the wrong parties in this case. We find it necessary to address this issue first having noted that the teamed judge in his grounds of judgment had taken the view that since the appellant had laid its challenge on the various steps taken and decisions made by the DGTU and DGIR the appellant should have made both the DGTU and DGIR as parties to the proceedings. The learned judge on that premiss had made a finding mat he would have to dismiss the appellant's application against the respondents as being misconceived since the wrong parties had been sued. With respect to the, learned judge's finding, in the present instance the challenge is against the first respondent's decision to accord recognition to the second respondent. In concluding that the action had been brought against the wrong party, the learned judge had erred in law in that the DGTU and DGIR have no power to accord recognition to the second respondent. Hence it would be erroneous to name them as parties to the action. The decision of the first respondent was premised on adopting the decisions of the DGTU and DGIR without actually applying his mind to the material before him. Accordingly if the decision-making process is flawed, then it is the decision of the first respondent that is opened to challenge.

We shall now deal with the merits of the appeal. The appellant has relied on a number of grounds in seeking an order of *certiorari* to quash the decision of the first respondent which can be broadly categorised as follows:

i. Illegal exclusion of temporary employees from scope of representation of the second respondent;

ii. breach of, the principles of natural justice and procedural unfairness;

iii. the deprivation of the appellants legitimate expectation;

iv. perverse and unreasonable exercise of discretion.

The law on judicial review has been aptly summarized by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union* [1995] 2 CLJ 748 cited with approval in the Federal Court's case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Another* [1996] 4 CLJ 687. His lordship Gopal Sri Ram, JCA in delivering the judgment of the Court of Appeal at p. 765 had this to say:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or or omits to take into account relevant consideration (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

Illegal Exclusion Of Temporary Employees From Scope Of Representation Of The Second Respondent

It is the appellant's contention that the entire recognition proceedings were riddled with fundamental errors in law which renders the order of recognition made by the first respondent defective and susceptible to an order of *certiorari.* Before we examine whether there are errors in law committed by the first respondent to warrant the issuance of an order of *certiorari*, it is crucial for us to appreciate the legal repercussions that ensue from the order of the first respondent ordering the appellant to accord recognition to the second respondent.

The order of recognition made under s. 9 of the Act would result in a trade union contracting on behalf of its members employed by the appellant for new or different terms and conditions of employment. This takes place in the form of collective bargaining. The expression "collective bargaining" is defined in s. 2 of the said Act as negotiating with a view to the conclusion of a collective agreement, whilst "collective agreement" means an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties. This will clearly indicate that once a trade union of employees is accorded recognition, it contracts on behalf of all employees within its scope of representation. The order of recognition would have the effect of taking away the individual rights of non-union members and future employees to contract and to bargain on their terms and conditions of employment. The contracting rights are, therefore, transferred from the employees to the trade union. The collective agreement will subsequently bind all employees who fall within the scope of representation of the trade union irrespective of whether they are members or not.

In ascertaining the status and category of workmen falling within the scope of Union representation it is necessary to examine and reproduce the following relevant statutory provisions:

Section 9(1) of the Act states that no trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say:

(a) managerial capacity;

(b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the abovementioned capacities.

Section 2 of the Act defines a workman as any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

Section 2 of the Trade Unions Act 1959 ["TU Act"] defines a "trade union" or "union" as any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be:

(a) within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries; and

(b) **whether temporary or permanent** (emphasis added).

Based on the above mentioned statutory provisions it would be wrong to exclude workmen who do not fall within the four categories above mentioned from the scope of union representation. Clearly, it would be illegal to exclude temporary employees from the scope of representation of the Union. In fact no distinction is made between temporary, casual or permanent employees.

The second respondent contends that there was no dispute within the meaning of s. 9(1A) of the said Act. This is in stark contrast to its actions. In its claim for recognition the second respondent sought recognition for all employees of the appellant. However upon the appellant requesting that a membership check be conducted in respect of all 541 of its employees, the second respondent took the stance that temporary and casual workmen were excluded from the second respondent's scope of representation. It is our view that in light of the fact that the appellant had contended that temporary and casual workmen were to be included in the scope of representation of the second respondents and the union's stance in adopting the opposite view, it is a condition precedent for the first respondent to ascertain the number and categories of workmen within the scope of representation of the second respondent before determining the secondary issue of whether to accord recognition.

Breach Of Principles Of Natural Justice And Procedural Unfairness

In this case the appellant had initially furnished the DGTU with a list of 88 of its permanent employees. Subsequently the appellant forwarded a revised list including the numbers and categories of temporary and casual employees who were also within the scope of representation of the second respondent. The DGIR then directed the DGTU that a membership check be conducted to ascertain the percentage of representation of the union. By a letter dated 28 March 1997, the DGIR was informed by the DGTU that a verification exercise had been conducted and that as at the date of the claim for recognition, the scope of representation of the second respondent was 72.41%.

By a letter dated 10 April 1997, the DGIR informed the appellant that 72.41% of its employees within the scope of representation of the second respondent had become members of the second respondent as at 12 August 1996 and advised the appellant to accord recognition to the second respondent. No particulars were given to the appellant as to how this percentage was arrived at. The appellant in its letter dated 23 April 1997 to the DGIR stated that it was unable to accept the decision on the membership check undertaken by the DGTU and express disappointment at the DGTU's refusal to undertake a secret ballot. The appellant informed the DGTU that in the circumstances, it was unable to accord recognition to the second respondent. In the aforesaid letter the appellant expressed doubt that 392 employees of the appellant could have been members of the second respondent as at 12 August 1996.

By a letter dated 15 May 1997 to the second respondent, the DGIR exercised his powers under reg. 4(1)(c) of the Industrial Relations Regulation 1980 and directed that the DGTU conduct a membership check once again to ascertain the number and categories of employees within the scope of representation of the second respondent in light of the appellant's assertion that as at 12 August 1996, ie, the second respondent's claim for recognition, it had 541 employees. Notwithstanding the direction of the DGIR, the DGTU nevertheless in ascertaining the percentage of membership excluded the category of temporary and casual employees in its determination. It is our finding that the DGTU had based its decision solely on the original incomplete list of employees and refused to consider the revised list submitted by the appellant when it had been directed to do so by the DGIR. Its refusal for doing so was premised on the second respondent's assertion that temporary and casual employees were not within the scope of representation of the second respondent. Without even according the appellant the opportunity to be heard, the DGTU arbitrarily decided that the second respondent's assertion must be accepted and dismissed the second list submitted by the appellant. We would think at the very least, the DGTU was obligated statutorily to verify whether the employees in the amended list were employees within the scope of representation. It is our view that the failure of the DGTU to include the temporary and casual employees in the verification exercise was an enror committed in breach of the provisions of the Trade Unions Act 1959 and the Industrial Relations Act 1967 and this nullified the entire recognition exercise.

In this case we also noted that quite apart from the exclusion of the temporary workmen from the scope of union representation, the appellant from the outset when served with a claim for recognition had requested for a membership check to be conducted by way of secret ballot and had furnished its reasons

for such preference. The second respondent on the other hand failed to provide any reasons for its choice of the membership check. Notwithstanding the appellant's request, the DGTU by its letter dated 5 February 1997 informed the appellant and the second respondent that it would be undertaking a membership verification exercise to ascertain the percentage of members in the second respondent. No reasons were furnished at this juncture as to why a membership verification exercise had been preferred.

Upon receipt of the DGTU's letter the appellant reiterated its request for a secret ballot to be conducted by a letter dated 14 March 1997 to the DGTU for the following reasons:

i. that most of their employees that had signed the membership forms did not know what they had signed,

ii. those that had signed the forms initially did not wish to join the union,

iii. there could be some false signatories,

iv. some of the employees had been coerced to sign the application forms.

It is to be noted that under the Trade Unions Regulations 1959, a membership check may be carried out by two methods, that is by way of secret ballot and verification exercise. Under reg. 62 of the Trade Unions Regulations 1959, the term "secret ballot" and "membership verification exercise" are defined as follows:

> "Secret ballot" means a secret ballot taken under these Regulations for the purpose of determining the percentage of workmen or any class of workmen in respect of whom a claim for recognition is being sought, who are members of the union making the claim.
>
> "membership verification exercise" means an exercise for verification of membership through checking membership application forms and other relevant records kept by a trade union of workmen which has made a claim for recognition.

The repeated request for a secret ballot by the appellant was dismissed off handedly without any reasons and the same stand was adopted *in toto* by the first respondent, notwithstanding the fact that he has the powers under s. 9 of the Act to reassess the materials placed before him. We noted that the DGTU's basis for opting for a membership verification exercise is premised on the policy of its department. However this policy does not emanate from any legislature or statutory guidelines. Section 26(3) of the TU Act provides where a trade union of workmen has served a claim for recognition under the Industrial Relations Act 1967, the Director General may, at the request of the

Director General for Industrial Relations, carry out a membership check in such manner as may be prescribed by regulations in order to ascertain the percentage of workmen or any class of workmen, in respect of whom recognition is being sought, who are members of the union making the claim. More important is reg. 63 of the Trade Union Regulations 1959 which stipulates that the DGTU has the choice to conduct a membership check by way of secret ballot and if so, he may notify the union or the employer that a secret ballot would be held. The provision of the said reg. 63 is reproduced as follows:

> (1) For the purpose of conducting a membership check under section 26(3) of the Act, the Director General may by notice in writing, notify the trade union of workmen making the claim for recognition that a membership verification exercise shall be conducted, or **notify the employer upon whom the claim for recognition has been served that a secret ballot shall be taken,** as the case may be, in accordance with such directions as the Director General may specify in such notice. (emphasis added)

It is our view the fact that the DGTU automatically rejected the appellant's request for a secret ballot on account of the fact that there was no joint request by the parties for a secret ballot is a perverse and unreasonable exercise of the discretion as to how to conduct the membership check. The provisions of the Trade Union Regulations 1959 do not prescribe that a secret ballot should only be undertaken if there was a joint request by the parties. Had this been the intention of the legislature, then no such choice or discretion would have been vested in the DGTU at the first instance. It is also our view had it been the policy of the department to proceed by way of a membership verification exercise, it was superfluous to have issued the letter of 15 January 1997 requesting the parties to state their preferred choice as to the method for membership check. More importantly, we noted that this policy of the department runs contrary to the stand that the DGTU and first respondent took in the case of *Minister of Human Resources v. National Union of Hotel, Bar and Restaurant Wokers* [1998] 1 CLJ 215. In that case, the company sought for a secret ballot to-be conducted. The union on the other hand requested for a membership verification exercise. Despite this the DGTU proceeded by way of a secret ballot. When the Minister of Human Resources rejected the recognition claim, based on secret ballot, the Union successfully quashed the decision in the High Court. The Minister appealed to the Court of Appeal and successfully argued that the decision to go by way of secret ballot was reasonable. The Court of Appeal endorsed the Minister's decision and held that the secret ballot was the most democratic way of determining the choice of the employees.

By reasons of the foregoing, it is our finding that there was a glaring absence of any consideration to the matters raised by the appellant as to why a secret ballot was the more appropriate mechanism to conduct the membership check. The exercise of the DGTU's discretion in the present case before us was a complete reverse to the stand taken by him in the Court of Appeal's case of *Minister of Human Resources v. National Union of Hotel, Bar and Restaurant Wokers (supra)*. The DGTU's decision adopted by the first respondent cannot be allowed to stand as the manner in which the decision was reached was unreasonable, perverse and unjustified.

Deprivation Of Legitimate Expectation

By virtue of the DGTU's letter of 15 January 1997 to the appellant it it our view that the appellant had acquired a legitimate expectation that a secret ballot would be carried out instead of verification exercise as the purpose was to determine the percentage of workmen who were members of the union making the claim for recognition. A secret ballot allows members to exercise their freedom of choice as to whether they wish to assign their bargaining power and freedom of contract to the Union. In contrast, a verification exercise merely involves an examination of the records furnished by the Trade Union. More importantly a verification exercise would not be able to address the issue which had been raised by the appellant in its letter of 14 March 1997 to the DGTU to ascertain the authenticity and voluntariness of the signatories in the membership rolls. The veracity of membership check by secret ballot has been expressly tested and sanctioned by the Court of Appeal in *Minister of Human Resources v. National Union of Hotel, Bar and Restaurant Wokers. Semenanjung Malaysia (supra)*, where in the court confirmed that a membership check conducted by secret ballot does not produce an unfair result. In addition, the court also held that the membership check by secret ballot was perfectly valid and not *ultra vires* the Trade Union Act 1959.

In the present case before us notwithstanding the second opportunity was accorded to the DGTU to verify the membership, the DGTU once again chose to ignore the reason furnished by the appellant as to why a secret ballot should be conducted. Whilst we are in agreement with the contention of the respondents that there is no statutory provision that a secret ballot be adopted, the converse is equally applicable. It is our finding that the first respondent, in agreeing and adopting the decision of the DGTU, and in making an order of recognition under s. 9 of the Act had acted in breach of the appellant's legitimate expectation that a secret ballot be conducted to determine the membership of the second respondent.

It is our view that it is of paramount importance to ensure that all the affected employees of the appellant have a right to state their choice through secret ballot as to whether they elect to be members of the second respondent and therefore assign their contracting right to the second respondent. This right of choice is preserved under the provision of reg. 67 of the Trade Union Regulations 1959, which states as follows:

> All workmen or any class of workmen, in respect of whom recognition is being sought who are in the employment of the employer on the date of claim **shall be entitled to vote in a secret ballot.** (emphasis added)

The importance of preserving the right of choice of the affected employees of the appellant in this case is well supported by the decision in the Court of Appeal's case of *Hong Leong Equipment v. Liew Fook Chuan* [1997] 1 CLJ 665 wherein it was *inter alia* held that employment is part and parcel of one's constitutional right guaranteed under arts. 5 and 8 of the Federal Constitution. The order of recognition, therefore, has a serious impact to the employees' constitutional right, as it would affect their terms and conditions of employment by the collective bargaining.

It is our finding that based on the matters hereinbefore highlighted there appears to be a major flaw in the decision making process of the first respondent when he issued the order of recognition in an obvious violation of the principles of legitimate expectation of the appellant that a secret ballot be held to determine the membership status of the second respondent. We therefore consider this is a case in which we would be justified in making an order of *certiorari* to issue.

Failure To Give Reasons For Decision

The law is clear that a decision-maker must adhere to the basic principles of nature justice and procedural fairness. Failure to do so will lead to a justifiable ground of intervention by a court of judicial review. The appellant had contended that the decision of the first respondent is flawed on the following grounds:

a. Failure to give reasons for his order for recognition;

b. Failure to furnish reasons for the adoption of the recommendation of the DGIR; and

c. Failure to give reasons for the rejection of the method of secret ballot.

In the case of *Rohana v. Universiti Sains Malaysia* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 his lordship Edgar Joseph Jr. (as he then was) held that the decision of the university in dismissing a group of lecturers was flawed as there was no reason given for the aforesaid dismissal. The learned judge in his judgment *inter alia* stated as follows:

> In the present case, it was argued, and I agree, that in a university environment, the exercise of reason and intellect are encouraged. The applicants are academics and should be told of the scope of free speech and interaction with students and why their defences were rejected. The giving of reasons for decision in a situation such as this would also serve as a guide to other academics in the position of the applicants. Moreover, the applicants' livelihood was at stake. As well put by Lord Denning in *Breen*'s case at page 191:
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> > If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need to be given. But if he is a person whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.
>
> In certain circumstances which I have endeavored to indicate, a reasoned decision can be an additional constituent of the concept of fairness. I am satisfied that having regard to all the circumstances of the present case was such a case. The applicants are also entitled to succeed on this ground since neither the disciplinary authority nor the university council gave any reasons for their decision.

In tandem with the above mentioned case, the Court of Appeal in Malaysia, more recently, has expounded a series of landmark decisions which expanded the scope of fairness in decision making process. In *Hong Leong Equipment v. Liew Fook Chuan (supra)* the Court of Appeal held that the Minister of Human Resources has a duty to give reason if he decides to refuse to refer a representation made under s. 20 of the Act. In short, it held that procedural fairness imposed a duty on the public decision-maker to give reasoned decisions.

Having regard to the foregoing principles, we find that the failure of the first respondent to give reasons for his order of recognition and for adopting the recommendations of the DGTU and the DGIR violates the rules of procedural fairness. It is true that the DGIR and DGTU have a discretion to decide on the method of membership check but this discretion is not unfettered and subject to the overriding principle of fairness. The first respondent, who adopted in toto the recommendations of the DGTU and DGIR gave no reasons

to justify his decision either. Although the first respondent's discretion under s. 20(3) of the Act is wide, such a discretion is not unlimited. (See the case of *Minister of Labour v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195).

The failure of the first respondent to give a reasoned decision when exercising his power under s. 9 of the Act is grossly inconsistent with the principles of fairness guaranteed under art. 8 of the Federal Constitution. The decision of the first respondent is, therefore, fundamentally flawed on the basis that it had violated the principles of procedural fairness guaranteed by art. 8 of the Federal Constitution and should be quashed. The effect of a flaw of such nature is aptly summarized by his lordship Gopal Sri Ram JCA in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah* [1998] 3 CLJ 85 wherein at p. 132 his lordship stated as follows:

> A public decision maker may not be procedurally compelled to furnish reasons for his decision. However, the absence of reason may warrant the drawing of what we call the 'Padfield inference', that is to say, the inference that there are no good reasons for the impugned decision. See *Padfield & Ors. v. Minister of Agriculture, Fisheries and Food & Ors.* [1968] AC 997. In other words:
>
> > ... courts will take into account any reasons which the body may give for its decisions. If it gives no reasons – in a case when it may reasonably be expected to do so, the Courts will infer that it has no good reason for reaching its conclusion and act accordingly.

For the reasons above stated we accordingly allowed the appeal and quashed the order of recognition of the second respondent made by the first respondent. The appellant shall have the costs of this appeal and those incurred in the court below. The deposit is to be refunded to the appellant.